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4 KEVIN A. GEARHART,  
5 Petitioner,  
6 v.  
7 JOSIE GASTELO,  
8 Respondent.

9 Case No. 18-cv-06017-WHO  
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**ORDER DISMISSING CERTAIN  
HABEAS CLAIMS;  
ORDER SERVING CERTAIN  
HABEAS CLAIMS**

Gearhart Kevin Gearhart filed a federal petition for a writ of habeas corpus under 28 U.S.C. § 2254. (Dkt. No. 1.) I previously dismissed some of Gearhart's claims as procedurally defaulted and stayed the rest of the case at Gearhart's request so that he could exhaust claims in state court. (*See* Dkt. No. 18.)

Gearhart exhausted claims in state court and the action was reopened. (Dkt. No. 21.) He filed a first amended petition, which did not provide specific facts to support each of Gearhart's claims. (*Id.* at 1.) I dismissed it with leave to amend. (*Id.*)

Gearhart has now filed a second amended petition. (Dkt. No. 22 ("SAP").) It is before me for review pursuant to 28 U.S.C. § 2243 and Rule 4 of the Rules Governing Section 2254 Cases. As discussed below, I will dismiss the Confrontation Clause claim with prejudice because Gearhart has failed to allege facts that would support such a claim after I identified that deficiency in the first amended petition. The remaining three claims may proceed.

**DISCUSSION**

A district court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in

1 custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C.  
2 § 2254(a). In considering an application for a writ of habeas corpus, the court shall “award  
3 the writ or issue an order directing the respondent to show cause why the writ should not  
4 be granted, unless it appears from the application that the applicant or person detained is  
5 not entitled thereto.” 28 U.S.C. § 2243. Summary dismissal is appropriate only where the  
6 allegations in the petition are vague or conclusory, palpably incredible, or patently  
7 frivolous or false. *See Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990).

8 Gearhart stated the following claims in his second amended petition:

- 9 (i) his rights under the Confrontation Clause were violated with respect to  
10 “motives and truth from accusers” (SAP at 3);
- 11 (ii) the admission of child sexual abuse accommodation syndrome (CSAAS)  
12 evidence violated his right to due process because (a) it is inherently  
13 prejudicial and (b) the jury instructions related to the CSAAS evidence were  
14 unclear (*id.* at 5);
- 15 (iii) the prosecutor failed to disclose favorable evidence (*id.* at 6); and
- 16 (iv) defense counsel rendered ineffective assistance by (a) waiving opening  
17 statements, (b) failing to cross-examine and impeach certain witnesses,  
18 (c) failing to exclude certain witnesses, (d) failing to consult experts, and  
19 (e) failing to exercise reasonable skill and diligence (*id.* at 6-7).

20 When liberally construed, Gearhart’s second, third, and fourth claims are  
21 cognizable and shall proceed.

22 Gearhart’s first claim cannot proceed because he again fails to provide specific facts  
23 to support a claim for violation of the Confrontation Clause. The Confrontation Clause  
24 “commands, not that evidence be reliable, but that reliability be assessed in a particular  
25 manner: by testing in the crucible of cross-examination.” *See Crawford v. Washington*,  
26 541 U.S. 36, 61 (2004); *see also Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) (noting a  
27 primary interest secured by the Confrontation Clause is the right of cross-examination).  
28 Gearhart fails to provide facts showing that he was not “confronted with the witnesses

1 against him.” U.S. Const. amend. VI. He offers no facts to suggest that he was prevented  
2 from cross-examining his accusers or any other witnesses, or that the cross-examination of  
3 any witness was curtailed in a manner that implicated his confrontation rights. (*See*  
4 *generally*, SAP.)

5 The opinion of the California Court of Appeal suggests that at least one of  
6 Gearhart’s accusers testified against him. *See People v. Gearhart*, No. H041051, 2017 WL  
7 75840, at \*5-6 (Cal. Ct. App. Jan. 9, 2017) (referring to Joshua’s testimony and cross-  
8 examination).<sup>1</sup> Rather than explaining how his confrontation rights were violated,  
9 Gearhart contends that his accusers were motivated to lie about the alleged sexual assault.  
10 (*See* SAP at 3-4). But such a motive could have been revealed during cross-examination  
11 of those accusers. To the extent he contends that defense counsel should have, but failed  
12 to, properly cross-examine Gearhart’s accusers about their alleged motivation to lie, such a  
13 contention falls within the purview of Gearhart’s fourth claim regarding ineffective  
14 assistance. Because Gearhart has provided no facts to support his Confrontation Clause  
15 claim, this claim is dismissed.

16 Dismissal of the Confrontation Clause claim is without leave to amend. Any further  
17 amendment would be futile, and it is well-settled that a “district court need not allow futile  
18 amendments.” *Snyder v. State of Nev.*, 852 F.2d 572 (9th Cir. 1988) (construing an  
19 amended complaint as a habeas petition and approving the district court’s dismissal  
20 because amendment would be futile) (citing *Klamath–Lake Pharmaceutical Ass’n v.*  
21 *Klamath Medical Serv. Bureau*, 701 F.2d 1276, 1293 (9th Cir. 1983)). Here, Gearhart has  
22 been given three opportunities to plead cognizable claims. (*See* Dkt. Nos. 1 (original  
23 petition), 20 (first amended petition), 22 (SAP).) I previously dismissed Gearhart’s first  
24 amended petition for a failure to plead sufficient facts, and cautioned him that on  
25 amendment he “must . . . provide specific facts in support of each claim.” (Dkt. No. 21 at

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27 <sup>1</sup> *See United States v. Black*, 482 F.3d 1035, 1041 (9th Cir. 2007) (Courts “may take notice  
28 of proceedings in other courts, both within and without the federal judicial system, if those  
proceedings have a direct relation to matters at issue.”); Fed. R. Evid. 201(c) (A court  
“may take judicial notice on its own” or after a party requests that it do so.).

1.) He failed to allege any facts that would support this claim and cure the deficiency I identified. Where an “amended petition does not cure the deficiency earlier identified by the court[,] [t]he court will not grant leave to amend because it would be futile.” *Slaughter v. McGraff*, No. C 02-3718 SI, 2002 WL 31932050, at \*1 (N.D. Cal. Jan. 3, 2002); accord *Snyder*, 852 F.2d at 572 (the proposed amendment would be futile because it “does not cure the deficiency” identified by the court). Accordingly, Gearhart’s claim for violation of the Confrontation Clause is dismissed without leave to amend.

## CONCLUSION

1. The Clerk shall serve electronically a copy of this order upon the respondent and the respondent's attorney, the Attorney General of the State of California, at the following email address: SFAWTParalegals@doj.ca.gov. The petition and the exhibits thereto are available via the Electronic Case Filing System for the Northern District of California. The Clerk shall serve by mail a copy of this order on Gearhart.

2. Gearhart's first claim is dismissed without leave to amend.

3. On or before **July 16, 2021**, respondent shall file with the Court and serve on Gearhart an answer conforming in all respects to Rule 5 of the Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be granted based on Gearhart's second, third, and fourth claims. Respondent shall file with the answer and serve on Gearhart a copy of all portions of the state trial record that previously have been transcribed and that are relevant to a determination of the issues presented by the petition.

4. If Gearhart wishes to respond to the answer, he shall do so by filing a traverse with the Court and serving it on respondent's counsel within thirty (30) days of the date the answer is filed.

5. In lieu of an answer, respondent may file, on or before **July 16, 2021**, a motion to dismiss on procedural grounds, as set forth in the Advisory Committee Notes to Rule 4 of the Rules Governing Section 2254 Cases. If respondent files such a motion, Gearhart shall file with the Court and serve on respondent an opposition or statement of non-opposition within thirty (30) days of the date the motion is filed, and respondent shall file

with the Court and serve on Gearhart a reply within fifteen (15) days of the date any opposition is filed.

6. Gearhart is reminded that all communications with the Court must be served on respondent by mailing a true copy of the document to respondent's counsel.

7. It is Gearhart's responsibility to prosecute this case. Gearhart must keep the Court and respondent informed of any change of address and must comply with the Court's orders in a timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

8. Upon a showing of good cause, requests for a reasonable extension of time will be granted provided they are filed on or before the deadline they seek to extend.

8. The filing fee has been paid. (Dkt. No. 1.)

## **IT IS SO ORDERED.**

**Dated:** April 7, 2021

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**WILLIAM H. ORRICK**  
United States District Judge